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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/647,068	08/22/2003	Louis C. Argenta	0101 P02977US1	9699

110                      7590                      09/20/2004

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EXAMINER

PHILOGENE, PEDRO

ART UNIT                      PAPER NUMBER

3732

DATE MAILED: 09/20/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No. 10/647,068	Applicant(s) ARGENTA ET AL.	
	Examiner Pedro Philogene	Art Unit 3732	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1)  Responsive to communication(s) filed on 22 August 2003.
- 2a)  This action is FINAL.
- 2b)  This action is non-final.
- 3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4)  Claim(s) 1-13 is/are pending in the application.
  - 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5)  Claim(s) \_\_\_\_\_ is/are allowed.
- 6)  Claim(s) 1-13 is/are rejected.
- 7)  Claim(s) \_\_\_\_\_ is/are objected to.
- 8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9)  The specification is objected to by the Examiner.
- 10)  The drawing(s) filed on \_\_\_\_\_ is/are: a)  accepted or b)  objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11)  The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a)  All    b)  Some \*    c)  None of:
    - 1.  Certified copies of the priority documents have been received.
    - 2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    - 3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1)  Notice of References Cited (PTO-892)
- 2)  Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3)  Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 11/21/03.
- 4)  Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5)  Notice of Informal Patent Application (PTO-152)
- 6)  Other: \_\_\_\_\_

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-13 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-13 of copending Application No. 10/227,161. Although the conflicting claims are not identical, they are not patentably distinct from each other because it is clear that all the elements of claims 1-13 of the '161 application, are to be found in claims 1-13 of '068 application. The difference between these two sets of claims lies in the fact that the claims of the '161 application includes many more elements and is thus much more specific. Thus the invention of claims 1-13 of the '068 application is in effect a "species of the "generic" invention of claims 1-13 of the '161 application. It has been held that the generic invention is "anticipated" by the "species". See *In re Goodman*, 29 USPQ 2d 2010 (Fed. Cir. 1993). Since, claims 1-13 of the '161 application are anticipated by claims 1-13 of

the '068 application, they are not patentably distinct from claims 1-13 of the '068 application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 4 and 13 are rejected under 35 U.S.C. 102(b) as being anticipated by Barbieri (3,874,387).

With respect to claim 4 and 13, Barbieri disclose a method of treating a bone defect comprising the steps of applying a reduced pressure to the bone defect; as set forth in column 1, lines 45-50; and, maintaining the reduced pressure until the bone defect has progressed toward a selected stage of healing, the selected stage of healing including formation of neo-osteoid tissue; as set forth in column 1, lines 38-50; column 3, lines 7-

20.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

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the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barbieri (3,874,387) in view of Argenta et al. (5,636,643).

With respect to claims 1-13, Barbieri disclose a method for administering, applying, facilitating, treating and healing a reduced pressure treatment to a damaged bone tissue. However, it is noted that Barbieri did not teach the steps of providing an impermeable cover adapted to enclose the damaged bone tissue and adapted to maintain reduced pressure at the site of the damaged bone tissue; providing a seal adapted to seal the cover to tissue surrounding the damaged bone tissue; providing reduced pressure supply means for connection to a source of suction, the reduced pressure supply means cooperating with the cover to supply the reduced pressure beneath the cover, providing a screen adapted to prevent contact between the cover and the damaged bone tissue, the screen being located between the damaged bone tissue and the cover, applying a reduced pressure under the cover to the damaged bone tissue and maintaining the reduced pressure until new bone tissue has grown at the damaged bone tissue to provide a selected stages of healing; as claimed by applicant. However, in a similar art, Argenta et al evidences the use of wound treatment employing reduced pressure using method steps as set forth above to promote tissue migration and thus facilitate in-growth, thereby closure of the wound.

Therefore, given the teaching Argenta et al, it would have been obvious to one having ordinary skill in the art at the time the invention was made to replace the method steps of Barbieri with the method steps; as taught by Argenta et al to provide a bone

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fracture treatment employing reduced pressure to promote tissue migration and thus induce venous stasis at the fracture site, thereby closure or healing of the bone.

***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

4,834,110	5-1989	Richard
4,382,441	5-1983	Svedman


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (703) 308-2252. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin P Shaver can be reached on (703) 308-2582. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Pedro Philogene  
September 17, 2004

  
PEDRO PHILOGENE  
PRIMARY EXAMINER